No. 01-213

Supreme Court, U.S.
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In The
Supreme Court of the United States

INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA,
Petitioner,

v.

UNITED STATES FOREST SERVICE,
and

MONTANA WILDERNESS ASSOCIATION, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an oil and gas association suffers an "injury in fact" for Article III standing purposes when the United States Forest Service exercises its discretionary authority to refrain for the time being from offering new oil and gas leases on particular national forest lands.

2. Whether an oil and gas association has prudential standing to pursue its purely economic interests in claims brought under two National Environmental Policy Act (NEPA) regulations, 40 C.F.R. § 1502.14 and 40 C.F.R. § 1503.1.

3. Whether the United States Forest Service is prohibited from considering the aesthetic impacts of oil and natural gas development when deciding whether to offer new oil and natural gas leases on national forest land.

LIST OF PARTIES

The following are parties to proceeding:

1. Petitioner:

Independent Petroleum Association of America

2. Respondents:

United States Forest Service
Montana Wilderness Association
Professional Wilderness Outfitters
Back Country Horsemen of Montana
The Wilderness Society, Inc.
Sierra Club
Montana Audubon
National Wildlife Federation
KAA Mo Taan
George Engler

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Montana Wilderness Association, Professional Wilderness Outfitters, Back Country Horsemen of Montana, The Wilderness Society, Sierra Club, Montana Audubon, and National Wildlife Federation have no parent companies and issue no corporate stock.

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INTRODUCTION

This case concerns a 1997 oil and gas leasing decision by the United States Forest Service for lands in the Rocky Mountain Division of the Lewis and Clark National Forest in Montana. For a variety of reasons, including overwhelming public opposition to industrial development in the area and the presence of numerous Native American cultural and religious sites, the Forest Service decided not to offer new oil and gas leases on the Rocky Mountain Division at this time. The Independent Petroleum Association of America (IPAA), an oil and gas trade association, challenged the Forest Service's decision on a variety of grounds. In a pair of unpublished decisions, the District of Montana and the Ninth Circuit rejected the association's challenges on substantive and jurisdictional grounds. This petition followed.

IPAA's petition should be denied. Because the Ninth Circuit's decision was unpublished, the ruling below does not set any precedent whatsoever. Nor can it possibly produce a split in authority worthy of Supreme Court review. Moreover, review would be unwarranted even if the opinion below had been published. The Forest Service made a balanced leasing decision that was fully supported by the evidentiary record. The Ninth Circuit's decision upholding that decision was correct as a matter of law and in perfect keeping with the case law in this Court and in every court of appeals. This unexceptional and unpublished opinion does not warrant Supreme Court review.

STATEMENT OF THE CASE

A. Background Of Oil And Gas Leasing On The Lewis And Clark National Forest

The Forest Service is responsible for managing the 191 million acres of land in the 155 units of the National Forest System. *See* 58 Fed. Reg. 19,369 (April 14, 1993). One of

the most spectacular of these units is the Lewis and Clark National Forest in Montana. This 1.8-million acre national forest is composed of two very different and geographically distinct divisions. The Jefferson Division has been heavily impacted by logging, grazing, mining, and road construction. By contrast, the relatively undeveloped Rocky Mountain Division encompasses much of Montana's spectacular Rocky Mountain Front just south of Glacier National Park.

The Rocky Mountain Front is home to some of the nation's most rare and imperiled wildlife, including the gray wolf and grizzly bear. In addition to hosting one of the most abundant and varied arrays of wildlife in the lower-48 states, the Front is a place of awe-inspiring physical beauty. Sculpted by alpine glaciers, the Front's mountains boast spectacular peaks, steep ridges, and narrow valleys. The Rocky Mountain Front is also endowed with Native American cultural and archaeological resources of immense significance. Pictographs, tipi rings, monumental rock features, cairns, vision quest locations, eagle catching pits, sweat lodges, conical timbered lodges, communal kill sites, and quarries have all been found on the Front. To this day, Blackfeet Nation tribal members use areas on the Front for cultural, religious, and subsistence purposes. This case has arisen because, in addition to the Front's remarkable environmental and Native American cultural attributes, some in the oil and gas industry believe that the area is endowed with significant natural gas reserves.

Forest Service oil and gas leasing decisions, including the one challenged in this case, are governed by the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.*, as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), 30 U.S.C. § 226(g)-(h). Regulations adopted pursuant to FOOGLRA create a staged decision-making process for oil and gas leasing. In the first stage, the Forest Service analyzes which lands should be "available" for possible leasing. 36 C.F.R. § 228.102(b)-(d). In the

second stage, the Forest Service considers which "available" lands to actually offer for leasing. 36 C.F.R. § 228.102(e). Finally, if the additional conditions set out in 36 C.F.R. § 228.102(e)(1)-(3) are satisfied, the Forest Service authorizes the Bureau of Land Management to offer the specified lands for lease. *Id.*; *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 45 (D.C. Cir. 1999) (describing leasing process). Thus, before a National Forest area can be leased to an oil and gas company, the land must pass both the "availability" stage of 36 C.F.R. § 228.102(d) and the "leasing" stage of 36 C.F.R. § 228.102(e).

Before it made its availability and leasing decisions for the Lewis and Clark National Forest, the Forest Service, as required by NEPA, prepared an environmental impact statement (EIS) that analyzed the impacts of a range of alternative development scenarios. *See* 42 U.S.C. § 4332(C). In so doing, the Service complied with NEPA's public participation provisions by circulating a draft version of the EIS for public review and comment. *See* 40 C.F.R §§ 1502.19, 1503.4, 1506.6 (public involvement regulations). In addition, the agency held informal briefing sessions with federal, state, county, local and tribal agencies and governments, and held a series of informational open houses throughout Montana.

The response was a resounding call for the Front to be put off limits to new development. As the Forest Service pointed out in its leasing decision, "[t]he vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration in the Lewis and Clark National Forest, particularly on the Rocky Mountain Front." App. 11.[1] Far from the being

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[1] The abbreviation "Pet. App." is used throughout to refer to the appendix to the petition for writ of certiorari. "App." refers to the appendix to this brief in opposition.

limited to the "emotional concerns of those far distant from Montana," as IPAA asserts, Pet. 2, opposition to oil and gas development on the Front came from a broad range of informed participants in the planning process, including elected officials, conservationists, editorial boards, recreationists, hunters, wilderness outfitters, small businesses, and tribal members. Newspapers ranging from the New York Times to the Great Falls Tribune in Montana editorialized against the exploitation of the Front's potential oil and gas reserves. Furthermore, a poll conducted by the Great Falls Tribune revealed that opposition to the development of the Front crossed Montana's regional, age, and gender lines.

The public's opposition to the development of the Front was based on many things. As Forest Supervisor Flora pointed out when she made the leasing decision, many opposed oil leasing on the Front for deep-seated aesthetic and emotional reasons. App. 11.[2] The ability to experience a truly wild landscape has become increasingly rare as America's few remaining wildlands have become settled, developed, and domesticated. This rare opportunity should not be sacrificed, many commentators remarked, for the sake of oil and gas development. *Id.* Other commentators opposed new oil and gas development because of the potential loss of recreational and hunting opportunities. This fear motivated many outfitters and related small businesses to oppose new leasing on the Front. In sum, the public's opposition to oil and gas development on the Front was broad, deep,

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[2] It is difficult to put a label on the social and personal concerns expressed by so many during the public comment period. In its leasing decision, the Forest Service refers to them collectively as "value of place" concerns. *See* App. 11. Because the experiential appreciation of an undeveloped landscape underlies so many of these comments, this brief refers to these as "aesthetic" concerns.

consistent, and overwhelming. While their reasons for opposing development varied, tribal members, conservationists, county commissioners, outfitters, dude ranchers, and many other citizens throughout Montana and the nation joined together in a chorus of opposition to the development of the Front's unique wildlands.

B. The Forest Service Leasing Decision At Issue In This Case

The Forest Service heeded the public's call when it made its oil and gas leasing decision in 1997. Rather than adopting a blanket, one-size-fits-all strategy for the 1,862,453 acres of land that make up the Lewis and Clark National Forest, the Forest Service chose a more tailored plan that differentiates between the Forest's two very different divisions. The Forest Service adopted a very aggressive approach to oil and gas development on the already-developed Jefferson Division pursuant to which: (1) all lands that are legally available for leasing would remain administratively available[3]; and (2) all administratively available lands would be offered for lease subject to appropriate stipulations and management directives. App. 6-8, 15; *supra* at 2-3 (explaining two-step leasing decision process).

As befits the area's very different character, the Forest Service adopted a different approach for the Rocky Mountain Division. As it did on the Jefferson Division, the Forest Service decided to continue to make all legally available lands administratively available for leasing. App. 6-8. However, the Forest Service decided not to offer new oil and gas leases in the Rocky Mountain Division at this time. App. 10-14. Because the Forest Service decided that the

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[3] The areas of national forests that are not legally available for oil and gas leasing are designated wilderness areas, wilderness study areas, areas that the Forest Service has recommended be designated as wilderness, and permitted ski areas.

legally available lands in the Rocky Mountain Division would remain administratively available, the Forest Service retained its ability to offer new leases in the area in approximately 15 years when the agency must revisit its development plans for the Lewis and Clark National Forest. App. 14. Thus, as the agency noted at the time, the Forest Service's decision "provides for flexibility in future leasing decisions" for the Rocky Mountain Division. App. 8.

In its Questions Presented and its Statement of the Case, IPAA suggests that the Forest Service's decision not to offer new leases at this time was based entirely on the "psychological" and "non-specific, emotional concerns" expressed by the public during the public comment period. *See* Questions Presented, Pet. 2. As the district court noted, this is "simply false." Pet. App. 12-13 n.3. The Forest Service based its decision on several factors, including religious and economic considerations.[4] Supervisor Flora states quite clearly that her decision was based both on "public comment and the information disclosed in the Final EIS." App. 10 (emphasis added). That information supported the economic and cultural, as well as the aesthetic, grounds upon which Supervisor Flora made her leasing decision.

That the Forest Service's decision was based, in part, on cultural considerations is apparent from the opening sentence of the agency's explanation for its decision. Supervisor Flora states in the Record of Decision that the potential impacts from oil and gas development to the cultural district

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[4] IPAA's suggestion that the Forest Service's leasing decision was based entirely on the public's aesthetic concerns is particularly surprising because IPAA argued in the courts below that the Forest Service decision violated the Constitution's Establishment Clause because the decision was founded in part on another concern, the desire to accommodate Native American religious concerns. *See* Pet. App. 3-4 (Ninth Circuit decision rejecting Establishment Clause claim).

in the Badger-Two Medicine portion of the Rocky Mountain Division provide "compelling reasons" not to offer new leases in that area. *Id.*

The Record of Decision also states that economic factors played a role in the agency's decision. App. 13. While Supervisor Flora recognized that development might provide revenue to local and state government, she noted quite rightly that maintaining the Front in a relatively undeveloped state could generate even more revenue over the long-term through tourism and recreational uses. App. 13. The Forest Service also found that there was no pressing need to exploit the potential natural gas reserves under the Rocky Mountain Front because of projections showing that adequate supplies would be available from other sources for at least fifteen to twenty years. App. 11.

C. The Proceedings Below

The Rocky Mountain Oil and Gas Association (RMOGA) sued the Forest Service in the District of Montana on May 21, 1998. IPAA was allowed to intervene as a plaintiff on December 30, 1998. In its motion for summary judgment, IPAA argued that the Forest Service's leasing decision violated NEPA, the Administrative Procedures Act, the Multiple-Use Sustained-Yield Act, the National Forest Management Act, and the Establishment Clause.

On March 7, 2000, in an unpublished opinion, the district court rejected every one of RMOGA's and IPAA's arguments on both substantive and jurisdictional grounds. Pet. App. 8-14. The court of appeals affirmed unanimously on May 3, 2001. Pet. App. 1-5.[5] The Ninth Circuit held that: (1) IPAA lacked Article III standing to pursue its statutory claims; (2) IPAA lacked prudential standing to

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[5] RMOGA did not appeal its loss in the District of Montana. The Ninth Circuit appeal, like this petition for a writ of certiorari, was pursued solely by IPAA.

pursue its purely economic interests through a NEPA claim; (3) the Forest Service's decision was not ultra vires because NEPA does not prohibit a federal agency from considering the psychological impacts of its actions and because the agency's consideration of those impacts in this case was not arbitrary; and (4) the Forest Service's consideration of the impacts of oil and gas leasing on Native American religious and cultural sites did not violate the Establishment Clause. Pet. App. 2-4. Like the district court opinion, the Ninth Circuit's opinion was unpublished. Pet. App. 1.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S DECISION WAS UNPUBLISHED.

IPAA asserts that the Ninth Circuit's decision in this case "expands a growing and nationally significant split between the Circuit Courts," Pet. 19, and "is in direct and intolerable conflict" with decisions from other courts, *id.* at 25. This dramatic language ignores the fact that the Ninth Circuit's opinion, like the district court's opinion before it, was unpublished. *See* Pet. App. 1. Under the Ninth Circuit's rules, therefore, the decision sets no precedent and may not even be cited to or by the courts of the Ninth Circuit. *See* App. 21 (Circuit Rule 36-3).[6] Thus, far from creating the harmful precedent and circuit splits imagined by IPAA, the Ninth Circuit's decision in this case sets no precedent

[6] There are several very narrow exceptions to this general rule, none of which are relevant to this appeal. For example, an unpublished opinion from the Ninth Circuit may be cited when relevant for the doctrine of law of the case, res judicata, or collateral estoppel. *See* App. 21 (Circuit Rule 36-3).

whatsoever.[7] As such, it is a remarkably poor candidate for Supreme Court review.

The Ninth Circuit's decision not to publish its decision no doubt explains the brevity with which it dispatched IPAA's claims. There is little incentive for a panel to set out its reasoning in great detail when the decision will not have any precedential force. Because the Ninth Circuit summarily rejected IPAA's claims rather than fully explicating the analyses underlying its decision, this Court would not have the benefit of a lower court's careful development of the issues involved. This fact, too, renders this case an extremely poor vehicle for Supreme Court review.

II. THERE IS NO CONFLICT REGARDING ARTICLE III STANDING.

Article III of the Constitution limits the jurisdiction of the federal judiciary to the resolution of "cases" or "controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* In order to satisfy this standing requirement, a plaintiff must demonstrate that: (1) he has been injured by the challenged action; (2) the injury was caused by the challenged action; and (3) it is likely that the injury will be redressed by a favorable court decision. *Id.* at 560-61.

IPAA argues that the Ninth Circuit's conclusion that IPAA has not suffered an injury sufficient to support its standing to pursue its statutory claims conflicts with *Arkla Exploration Co. v. Texas Oil and Gas Corp.*, 734 F.2d 347

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[7] The Ninth Circuit's decision to issue an unpublished memorandum rather than a published opinion is indicative of the court's view that IPAA's case was neither strong nor analytically complex. *See* App. 20 (Circuit Rule 36-2 describing circumstances under which a court will order the publication of its opinion).

(8th Cir. 1984), and with several recent decisions by this Court concerning government contracting rules. No such conflict exists.

IPAA asserts that the Forest Service's decision not to offer new leases on the Rocky Mountain Division at this time injures the association because its members were denied "the opportunity to bid for valuable rights." Pet 14. *See also* Pet. 20 (asserting that it has suffered the requisite injury because its members were "barred from bidding on oil and gas leases" in the area). In making this argument, IPAA loses sight of the fact that, for Article III purposes, it is not enough that the Forest Service's decision is less economically advantageous to IPAA than the aggressive development option that IPAA favors. Rather, the challenged action must mark an "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. Thus, in order for the Forest Service's no-leasing decision to injure IPAA within the meaning of Article III, IPAA must have a legally protected right to bid for new oil and gas leases in the Rocky Mountain Division.

The principle that a plaintiff's injury must be based on a legally protected interest in order to satisfy Article III is exemplified in *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993), in which the Eleventh Circuit held that timber companies did not have standing to challenge a Forest Service program to protect an imperiled woodpecker species. The court reached this result even though the program reduced the amount of timber that would be available for purchase in the future. Because the court determined that "the Timber Companies have no right to compel the Forest Service to sell any future timber to them," the court held that a program that reduced the amount of available timber did not affect any legally protected interest and so did not injure the timber companies for standing purposes.

Similarly, in *State of Utah v. Babbitt*, 137 F.3d 1193, 1207 (10th Cir. 1998), the Tenth Circuit held that the State of Utah did not have standing to challenge the federal government's refusal to allow the State to participate in a federal land wilderness inventory. The court explained that "[w]e look first to . . . determine whether Plaintiffs have a right to participate in the inventory process. If we conclude that Plaintiffs do not have such a right, then Plaintiffs' claimed injury based on the denial of this right is without merit and they consequently lack standing to challenge the 1996 inventory on these grounds." *See also Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997) ("if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue."); *Arjay Assoc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right . . . .").

Just as the State of Utah had no legally protected right to participate in the wilderness inventory process and the timber companies had no right to compel the Forest Service to offer them timber, so IPAA has no right under any statute to bid on new natural gas leases in the Rocky Mountain Division. The Mineral Leasing Act of 1920, which governs oil and gas leasing on the national forests, leaves the Forest Service with broad discretion concerning where, if anywhere, to offer new leases. The Act states generally that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary." 30 U.S.C. § 226(a) (emphasis added). The "permissive word 'may' in § 226(a) allows the Secretary to lease such lands, but does not require him to do so . . . . [T]he Secretary has discretion to refuse to issue any lease at all on a given tract." *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975). This Court reached the same conclusion in *Udall v. Tallman*, 380 U.S. 1, 4 (1965), in which it declared that the Mineral Leasing Act "left the

Secretary discretion to refuse to issue any lease at all on a given tract." *See also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988) (refusal to issue leases constitutes "legitimate exercise of the discretion granted to the Interior Secretary"); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) ("While the statute gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory."); *McTiernan v. Franklin*, 508 F.2d 885, 887 (10th Cir. 1975) (under § 226(a), the government "may refuse to issue any lease at all on a given tract"); *Pease v. Udall*, 332 F.2d 62, 63 (9th Cir. 1964) (Mineral Leasing Act "has consistently been construed as leaving to the Secretary, within his discretion, a determination as to what lands are to be leased thereunder"); *Pacific Legal Found. v. Watt*, 529 F. Supp. 982, 991 n.14 (D. Mont. 1982) (under § 226(a), "the Secretary has discretion either to issue or refuse to issue oil and gas leases").[8] As this extensive and unanimous case law demonstrates, IPAA has no legally protected interest in being

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[8] These cases undermine IPAA's claim that the Secretary's no-lease decision must be subject to judicial review under the Administrative Procedure Act (APA). Pet. 12-13. Because, as the case law makes clear, the Mineral Leasing Act does not place any legal restrictions whatsoever on the Secretary's ability to refrain from offering new leases, any such decision is necessarily exempt from judicial review under the APA. *See* 5 U.S.C. § 701(a)(2) (APA's judicial review provisions do not apply to actions "committed to agency discretion by law"); *see also Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (statute giving Director of CIA power to terminate agency employees whenever the Director "shall deem such termination necessary or advisable in the interests of the United States" strongly suggests that termination decisions are "committed to agency discretion by law" and so not subject to judicial review) (quoting 50 U.S.C. § 403(c) (National Security Act of 1947) and 5 U.S.C. § 701(a)(2)).

offered leases on the Rocky Mountain Division.[9] Lacking any such interest, IPAA necessarily fails the injury prong of the Article III standing test.[10]

IPAA does not address any of the above case law in its petition. Instead, it relies on *Arkla Exploration Co. v. Texas Oil and Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), and on a series of decisions from this Court concerning government contracting. *See* Pet. 14-20. These cases, however, are

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[9] IPAA attempts to manufacture a right to bid on leases in the Rocky Mountain Division by misquoting 30 U.S.C. § 226(b)(1)(A). *See* Pet. 14 n.4. Far from creating a right to be offered a lease on any land within a producing oil and gas field, as IPAA's misquotation implies, § 226(b)(1)(A) simply provides that competitive bidding will take place in most instances for the lands that the Secretary has, in his discretion, previously decided should be leased. *Duesing v. Udall*, 350 F.2d 748, 750 (D.C. Cir. 1965) (under the Mineral Leasing Act, "it is permissive or discretionary whether or not the Secretary will issue a lease on lands believed to contain oil or gas deposits. What is mandatory is who is to get the lease if it is decided that a lease will be issued – if there is a known geologic structure, the highest bidder; if not, the first applicant in line.").

[10] In addition, IPAA cannot satisfy the redressability requirement of Article III because no court may compel the Forest Service to offer new oil and gas leases in the Rocky Mountain Division. *See, e.g., Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 874 (10th Cir. 1992) (mining company failed to satisfy redressability requirement when it alleged that it would suffer economic injury from a land exchange that would prevent the company from competing for possible government coal leases on the exchanged land); *Marathon Oil Co. v. Babbitt*, 966 F. Supp. 1024, 1025-26 (D.Colo. 1997), *aff'd*, 166 F.3d 1221 (10th Cir. 1999) (unpublished), *cert. denied*, 528 U.S. 819 (1999) (because court may not order government to offer particular oil and gas leases, oil company could not satisfy redressability requirement in challenge to federal government's decision not to offer new oil and gas leases in area of Colorado).

entirely inapposite because they involve instances in which agencies had decided to offer contracts for bid and the plaintiffs challenged the legality or constitutionality of the bidding processes. *See Arkla*, 734 F.2d at 353-54 (challenge to granting of oil and gas leases that were awarded on a noncompetitive rather than competitive basis); *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 659 (1993) (equal protection challenge to city ordinance that gave preferential treatment to certain minority-owned businesses in the awarding of city contracts); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204-10 (1995) (equal protection challenge to federal government's practice of giving general contractors on government projects a financial incentive to hire certain minority-owned subcontractors). None of these cases had anything whatsoever to do with whether the plaintiffs had standing to challenge an agency's discretionary decision not to offer a contract in the first place.[11]

There is no question that bidders have a cognizable legal interest in the legality and constitutionality of any bidding process in which they have a right to be involved. Therefore, there is little question but that IPAA would have standing to challenge the Forest Service if the agency had decided to

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[11] IPAA also cites to *Bryant v. Yellen*, 447 U.S. 352 (1980), to support its argument that it has suffered a cognizable injury even though it has no right to be offered any leases at all in the Rocky Mountain Division. *See* Pet. 14-15. In that case, however, the Court found that it was "likely" that lands would become available were the desired judicial relief granted. *Bryant*, 447 U.S. at 368. Though IPAA baldly asserts that oil and gas leases would likely be offered if it were to prevail in this case, Pet. 15, there is not the slightest shred of evidence to support this view. Furthermore, given the many reasons behind the Forest Service's no-leasing decision, *see* text *supra* at 6-7, there is every reason to believe that the agency will refrain from offering leases regardless of the final outcome of this litigation.

offer the Rocky Mountain Division for oil and gas leasing and then carried out the bidding process in an illegal or unconstitutional manner. However, as demonstrated by the discretionary language in the Mineral Leasing Act, and as recognized by this Court and others, the Forest Service has absolutely no duty under the Mineral Leasing Act to offer the Rocky Mountain Division for leasing at this or any other time. As a consequence, IPAA can have no legally protected right to bid for oil and gas leases in the area.

The distinction that IPAA fails to appreciate between an interest in being offered a new lease in an undeveloped area and an interest in the legality of the bidding process for any lease that the agency decides to offer has not been lost on other courts. In *Region 8*, the timber companies, like IPAA in this case, argued that they had standing to challenge the woodpecker preservation program because the companies were analogous to losing bidders for a government contract. *Region 8*, 993 F.2d at 808 n.12. The Eleventh Circuit rejected this argument, explaining that the timber companies "fail to appreciate that a losing bidder has a right that bid procedures be conducted in accordance with the applicable statutes and regulations, and that its bid not be arbitrarily rejected. . . . No such right is conferred upon the Timber Companies" to be offered any particular amount of timber. *Id.*

This Court, too, has appreciated that the Mineral Leasing Act may create a cognizable legal interest once a lease is offered without creating a legal interest in being offered the lease in the first place. As this Court explained in *Udall v. Tallman*, although the Mineral Leasing Act "directed that if a lease was issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *see also Duesing*, 350 F.2d at 750-51 (under the Mineral Leasing Act, merely filing an application to lease an area "does not give any right to lease,

or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved").

As the preceding discussion demonstrates, courts have held unanimously that the Forest Service has broad discretion under the Mineral Leasing Act to refuse to offer any particular areas for new oil and gas leasing. Because of this discretion, neither IPAA nor any of its members have a legally cognizable interest in being offered new leases in the Rocky Mountain Division. Lacking such an interest, IPAA cannot satisfy the injury prong of the Article III standing test. There is no conflict among the circuits or with this Court on this point. IPAA's request for writ of certiorari on this issue should be denied.

III. THERE IS NO CONFLICT REGARDING PRUDENTIAL STANDING.

IPAA argues that the Ninth Circuit's conclusion that the association lacked prudential standing to pursue its NEPA claims conflicts with *Bennett v. Spear*, 520 U.S. 154 (1997), and with the Eighth Circuit's decision in *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999). Pet. 22-25. IPAA is mistaken.

In *Bennett v. Spear*, this Court held that plaintiffs' economic interests fell within the zone of interests of 16 U.S.C. § 1536(a)(2), an Endangered Species Act ("ESA") provision that requires an agency to "use the best scientific and commercial data available." *Bennett*, 520 U.S. at 176-77. Plaintiffs had prudential standing, this Court held, because one objective of this particular provision is to "avoid needless economic dislocation." *Id.* at 176. In reaching this conclusion, this Court emphasized that:

> Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests tests is to be determined not by

> reference to the overall purpose of the Act in question . . . , but by reference to the particular provision of law upon which the plaintiff relies.

Id. at 175-76 (quoting *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)). Thus, *Bennett* stands for the proposition that an economic interest may satisfy the prudential standing requirement in an environmental statute only if plaintiff's suit is based on a provision that has an economic purpose.

Courts before and after *Bennett* repeatedly have held that purely economic interests are not within NEPA's zone of interests. For example, in *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 407-08 (D.C. Cir. 2000), Judge Silberman ruled that a pipeline company with purely economic interests lacked prudential standing to challenge the adequacy of the range of alternatives in a NEPA analysis. *See also Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1157-58 (9th Cir. 1998) (post-*Bennett* decision holding that "[p]urely economic interests do not fall within the zone of interests to be protected by NEPA"); *Western Radio Servs., Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir. 1996) ("NEPA's purpose is 'to protect the environment, not the economic interests of those adversely affected by agency decisions.'") (quoting *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)); *Hurd Urban Dev., L.C. v. Federal Highway Admin.*, 33 F. Supp. 2d 570, 573-74 (S.D.Tex. 1998) (listing cases and concluding that "all NEPA claims based on economic harm must be dismissed for lack of jurisdiction"); *cf. Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) (NEPA's purpose is to "protect[] the physical environment").

The lone case in which a court has found that purely economic interests are within the zone of interests of any NEPA provision is *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999), the case upon

which IPAA relies. In that case, a coalition of outfitters and others with purely economic interests challenged the range of alternatives and the adequacy of the economic analysis in the EIS for a management plan for the Boundary Waters Canoe Area. *Id.* at 1125-27. Unlike every other court to consider the issue, the Eighth Circuit concluded that the outfitters had prudential standing because the court believed that the particular statutory provisions and regulations at issue in that case have an economic purpose. *Id.*

Even if *Friends of Boundary Waters* were the rule rather than the outlier case that it is, there would be no conflict between that case and the Ninth Circuit's decision here because IPAA's legal claims are not based on either of the NEPA provisions that IPAA believes have an economic component. The first provision upon which IPAA relies for its prudential standing is the extremely general policy statement in NEPA that:

> it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a) (cited at Pet. 23). This policy statement – which likely could not give rise to any legal claim at all – was never cited in IPAA's administrative appeal or complaint. Nor was this section so much as mentioned in IPAA's district or appellate court briefing. The same is true for the second provision cited by IPAA, 40 C.F.R. § 1508.14, which requires NEPA analyses to consider the economic impacts of an action when those impacts are interrelated with the action's environmental impacts. *See* Pet. 23.

IPAA claims in this case that the Forest Service violated NEPA by adopting a leasing alternative that did not provide for any new oil and gas leasing in the Rocky Mountain Division and by making a leasing decision that combined two alternatives from the Final EIS. According to IPAA's complaint, these actions violated two NEPA regulations concerning public disclosure and comment, 40 C.F.R. § 1502.14 and 40 C.F.R. § 1503.1. Neither of these regulations have any economic component and neither is related in any way to 42 U.S.C. § 4331(a) or 40 C.F.R. § 1508.14, the two NEPA sections cited in the petition to support IPAA's prudential standing. Under *Bennett*'s provision-specific approach, therefore, 42 U.S.C. § 4331(a) and 40 C.F.R. § 1508.14 are entirely irrelevant to the prudential standing inquiry in this case. As the D.C. District Court explained just last year in a similar case:

> *Bennett* makes clear that in determining whether plaintiffs' interest is protected by the statute, the Court looks only at the statutory provision at issue . . . . Plaintiffs, however, rely on statements in the legislative history and in other provisions of the statute to make th[eir] argument. Under *Bennett*, this analysis is clearly inappropriate.

National Wildlife Fed'n v. Westphal, 116 F. Supp. 2d 49, 54 (D.D.C. 2000).

Because the regulations upon which IPAA's NEPA claims are founded do not have any economic component or purpose, IPAA lacks prudential standing to pursue its economic interests through NEPA. The Ninth Circuit's conclusion to this effect is in perfect keeping with the case law and so does not warrant review by this Court.

IV. THE FOREST SERVICE IS FREE TO CONSIDER AESTHETIC AND PSYCHOLOGICAL FACTORS WHEN MAKING OIL AND GAS LEASING DECISIONS.

IPAA asserts that *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), required the Forest Service to ignore the public's aesthetic and psychological concerns when the agency was deciding whether to allow new oil and gas development on the Rocky Mountain Front. *See* Pet. 25-30. IPAA misreads *Metropolitan Edison* and misunderstands NEPA's role in the agency decision-making process.

The issue in *Metropolitan Edison* was whether NEPA required an environmental analysis prepared by the Nuclear Regulatory Commission to consider the psychological impacts to the surrounding community of restarting one of the nuclear reactors at Three Mile Island. Thus, *Metropolitan Edison* involved the types of impacts that a NEPA analysis must consider and had nothing whatsoever to do with the impacts that a NEPA analysis may consider.[12] IPAA fails to

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[12] The same is true for every one of the other cases cited by IPAA in support of its claim that there is a conflict between the Ninth Circuit's decision in this case and *Metropolitan Edison* and its progeny. *See* Pet. 27-28. *See Cellular Phone Taskforce v. Federal Communications Comm'n*, 205 F.3d 82, 95 (2nd Cir. 2000) (NEPA did not require EIS to consider possibility that radio frequency radiation could interfere with medical devices); *Olmstead Citizens for a Better Community v. United States*, 793 F.2d 201, 204-05 (8th Cir. 1986) (NEPA did not require an analysis by the U.S. Bureau of Prisons to analyze the possibility that converting a mental hospital to a prison would increase crime and hinder development in the surrounding community); *New York v. United States Dep't of Transp.*, 715 F.2d 732, 751 (2nd Cir. 1983) (NEPA analysis concerning the transportation of radioactive

appreciate that these are entirely distinct questions: just because NEPA does not require particular impacts to be addressed does not mean that NEPA is violated if an EIS addresses such issues. There is nothing in NEPA or its implementing regulations that says that an environmental analysis may not exceed the bare legal requirements of the Act. Nor has this or any other court ever held that an agency violated NEPA by analyzing an action too fully.

Moreover, the court in *Metropolitan Edison* did not hold that an EIS must, or even may, ignore the psychological impacts of a federal action. To the contrary, this Court clearly recognized that "effects on human health can be cognizable under NEPA, and that human health may include psychological health." *Metropolitan Edison*, 460 U.S. at 771; *see also id.* at 779 (Brennan, J., concurring) ("There can be no doubt that psychological injuries are cognizable under NEPA."). [13] Plaintiffs in *Metropolitan Edison* did not lose their challenge to the restarting of the nuclear power plant because they alleged a psychological impact. They lost because the psychological injury they wanted analyzed did not result from the environmental impact of restarting the plant, but from their fear of a future accident. *Id.* at 768. The Supreme Court held that the EIS need not consider this psychological injury because it arose "out of a perception of risk." *Id.* at 779 (Brennan, J., concurring) (citing majority

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materials was not required to analyze the psychological impact of the transportation policy).

[13] Courts have also long made plain that a NEPA analysis must consider "psychological" impacts relating to quality of life and impacts to aesthetic sensibilities. *See Hanly v. Mitchell*, 460 F.2d 640 (2nd Cir. 1972); *City of Rochester v. United States Postal Serv.*, 541 F.2d 967 (2nd Cir. 1976); *Maryland Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1038 (D.C. Cir. 1973) ("NEPA contemplates that aesthetic considerations are part of the quality of the human environment.").

opinion at 774-76). To require an EIS to consider fears of possible accidents, the court ruled, "lengthens the causal chain beyond the reach of NEPA." *Id.* at 775.

The aesthetic harms that the public is concerned with in this case, by contrast, flow directly from oil and gas development. Unlike plaintiffs' fears in *Metropolitan Edison*, the public's aesthetic concerns in this case are tied immediately to a change in the environment – the construction of oil and gas facilities – and so are cognizable impacts under NEPA.[14]

Finally, while *Metropolitan Edison* addressed what must be analyzed in an EIS, IPAA's arguments concern the permissible grounds for an agency decision. This is an entirely different question because while NEPA's implementing regulations say a great deal about what impacts must be considered in an environmental analysis, *see*

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[14] IPAA proclaims that there is a "zero percent chance" that anyone would ever experience a change in the environment from oil and gas leasing along the Rocky Mountain Front. Pet. 29. IPAA support this remarkable claim with a citation to the Forest Service's optimistic claim that "limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resource values." *Id.* (citing to Pet. App. 30). IPAA fails to appreciate the difference between measurable physical degradation of an area – *e.g.*, the fouling of a stream or the extermination of a native wildlife population – and the experiential and aesthetic impacts that flow from the development of a pristine area. Even if a natural gas wellsite did not significantly degrade a "surface value" such as water quality, it could certainly degrade the experience of the hiker, horseman, fisherman, or hunter who comes to enjoy the Rocky Mountain Front's solitude and untouched beauty and instead finds natural gas facilities.

40 C.F.R. § 1502, they say nothing whatsoever about the reasons that an agency may invoke in choosing a course of action.

NEPA is a purely procedural statute. *See, e.g., Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). While NEPA requires agencies to consider the environmental consequences of their actions, NEPA does not require agencies to base their final decisions on environmental factors alone. As this Court has said, "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (quoting *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)). *See also Laguna Greenbelt v. United States Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994) ("NEPA does not mandate particular substantive results, but instead imposes only procedural requirements.") (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978)); *Half Moon Bay*, 857 F.2d at 508 ("If the agency has taken a 'hard look' at a decision's environmental consequences, the decision must not be disturbed."). Thus, IPAA's argument that the Forest Service violated NEPA in its leasing decision by giving too much weight to the public's aesthetic concerns mistakes NEPA's purely procedural role. Because NEPA does not address or limit an agency's ultimate decision, IPAA's argument that NEPA required the Forest Service to weight its decision-making differently must be rejected.

Furthermore, requiring agencies to base their decisions solely on the impacts that must be considered in NEPA's environmental analysis would yield obviously unintended results. For example, when it decides whether to construct a military base – which construction is subject to NEPA – the Department of Defense can obviously consider the national

security need for the base and the strategic importance of a particular location even though neither of these factors must be analyzed in the EIS. Indeed, NEPA's regulations specifically anticipate that an agency may decide to carry out an action for non-environmental reasons. 40 C.F.R. § 1505.2(b) requires an agency to explain its decision in a Record of Decision, a document separate from the EIS. As this regulation recognizes, economic, technical, statutory, and national policy reasons may influence an agency's ultimate decision. *Id.* IPAA's argument to the contrary is baseless.

CONCLUSION

IPAA presents no legitimate reason for this Court to review the unpublished decision of the Ninth Circuit. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 25, 2001

App. 1

LEWIS AND CLARK NATIONAL FOREST
OIL AND GAS LEASING

FINAL ENVIRONMENTAL IMPACT STATEMENT
RECORD OF DECISION

Lewis and Clark, Teton, Pondera, Glacier, Cascade,
Chouteau, Meagher, Park, Judith Basin,
Wheatland, Fergus, Musselshell, Golden Valley,
and Sweetgrass Counties

MONTANA

Prepared by:

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MONTANA STATE OFFICE

August 28, 1997

I. INTRODUCTION

Purpose and Description of the Record of Decision (ROD)

This ROD documents the Forest Service decisions concerning which lands will be administratively available for oil and gas leasing in accordance with 36 CFR 228, 102(d) and which lands specifically the Forest Service is authorizing the BLM to offer for lease in accordance with 36 CFR 228.102(e) and Forest Service Policy.

The Mineral Leasing Act of 1920 (as amended) provided that all public lands are open to oil and gas leasing, unless a specific land order or law has been issued to close an area. The Federal Onshore Oil and Gas Leasing Reform Act was enacted by Congress in 1987 and gave the Secretary of agriculture additional responsibilities for leasing decision. Implementing regulations for the U.S. Department of Agriculture at 36 CFR 228 and the Department of Interior at 43 CFR 3100 were finalized and published in the Federal Register on March 21, 1990, and June 17, 1988, respectively. The regulations set forth the procedures by which the Forest Service and the Bureau of Land Management (BLM) will carry out their statutory responsibilities in the issuance of oil and gas leases.

These decisions incorporate the lease terms and stipulations determined necessary to mitigate effects to surface resources. These measures are based on analyses documented in the Lewis and Clark National Forest Oil and Gas Leasing Final Environmental Impact Statement (Final EIS) and the Lewis and Clark National Forest Land and Resource Management Plan (Forest Plan).

These decisions were guided by the results of a comprehensive analysis that considered the cumulative effects of activities on the current and future resources, economics, and social patterns of this highly sensitive area. Also considered was a great deal of public comment expressed both in favor of and against leasing in the Lewis and Clark National Forest; comments received not only at this time, but also over the past two decades on this issue. Although this input may not necessarily reflect the opinion of all affected or interested people, these decisions attempt to balance the conflicting viewpoints and resource concerns.

Decisions of this nature, which may have a lasting-effect on a very significant area, do not come easily. Oil and gas

leasing, and subsequent actions, have been a contentious issue, particularly on the Rocky Mountain Division; an area considered to have high potential for significant hydrocarbons resources while also valued for its wildlife, recreational, cultural and aesthetic qualities. The fact the area in question is held in the highest regard by many people who have never even seen it, makes decisions of this nature even more difficult. As such, none of the pertinent information or substantive comments were taken lightly; all of this information figured into the final analysis in some way. It is important for the reviewer to know these factors were closely considered in the attempt to arrive at a decision which is a balance between conflicts, public opinion, opportunities, supply and demand, resource capability, and the needs of future generations.

This ROD also documents the Forest Service decision to amend the Lewis and Clark National Forest Plan regarding which lands are administratively available for oil and gas leasing and where the Selected Alternative differs from the Forest Plan Standards or Management Direction.

This ROD documents the BLM decision to use the Final Lewis and Clark National Forest Oil and Gas Leasing Environmental Impact Statement as its National Environmental Policy Act (NEPA) compliance document for: 1) offering lands for lease within the Jefferson Division of the Lewis and Clark National Forest subject to stipulations identified in this ROD;, and 2) making private surface-federal minerals within the administrative boundaries of the Jefferson Division of the Lewis and Clark National Forest open for oil and gas leasing.

Purpose and Need for the Action

The purpose and need of this project is, first, to comply with Congressional intent. In response to the Leasing Reform

Act, and in accordance with 36 CFR 228.102, the Forest Service must determine which lands in the Lewis and Clark National Forest are administratively available for oil and gas leasing, and determine which specific lands in the Lewis and Clark National Forest the Forest Service will authorize the BLM to offer for lease. The detailed purpose and need for this analysis can be found in the Final EIS on pages 1-7 and 8.

Geographic Scope

The geographic scope of the analysis area for determination of both the Availability Decision and the Leasing for Specific Lands decision is identified by the boundaries shown on the accompanying maps. The area contains all of the lands administered by the Lewis and Clark National Forest. The area is located in portions of Lewis and Clark, Teton, Pondera, Glacier, Cascade, Chouteau, Meagher, Park, Judith Basin, Wheatland, Fergus, Musselshell, Golden Valley, and Sweetgrass Counties in Central Montana. Within the analysis area there are 1,829,609 acres with Federal jurisdiction of surface use and Federal jurisdiction of minerals. There are an additional 32,966 acres of split estate lands and outstanding mineral reserved rights for oil and gas.

II. DECISIONS AND RATIONAL FOR THE DECISIONS

I have selected from two alternatives displayed in the Final EIS for the availability and leasing decisions. I am selecting Alternative 1(a) for the Rocky Mountain Division. No lands on the Rocky Mountain Division will be offered for lease. Map II-1 displays Alternative 1(a) for the Rocky Mountain Division. I am selecting Alternative 7 for the Jefferson Division. Certain lands on the Jefferson Division will be offered for lease with stipulations to protect resource values.

Map II-16 displays the areas that will be offered for lease and the stipulations that will apply on the Jefferson Division.

Under the implementing regulations, the Forest Service has two decision points relating to oil and gas leasing. In this instance, the Forest Service has decided to combine the Lands Administratively Available Decision, with the Leasing of Specific Lands Decision. Both of these decisions are documented in this Record of Decision. Once these decisions have been made, the Forest Service will have authorized the BLM to offer specific lands for lease subject to appropriate stipulations. After the lands have been leased, the lessee can file an Application for Permit to Drill (APD). An APD must go through further site-specific NEPA analysis and decisionmaking (36 CFR 228.105-109).

The Leasing Reform Act of 1987 modified the authorities of the Secretaries of Interior and Agriculture. The Forest Service developed implementing regulations which defined the procedures to be used and established the foundation for decision-making. The Final Rule was published in the Federal Register on March 21, 1990 (36 Code of Federal Regulations, Part 228, 100 et. seq.; 55 FR 10423).

As we continue discussions in this document we will refer to 228.102(d), as the Availability Decision, and the 228.102(e), as the Leasing for Specific Lands decision. Both of these decisions must occur prior to the time the BLM offers specific National Forest System lands for lease.

The following text describes this decision process.

A. AVAILABILITY DECISION – 36 CFR 228.102(d) – Area or Forest-wide Leasing decisions (Lands Administratively Available For Leasing)

The first decision is which lands to make administratively available for leasing, or which lands are open to leasing. This decision enables the oil and gas industry to know which National Forest System lands may be available for leasing now or during this planning period (about 10-15 years). Forest Service publication of this decision is intended to enable the oil and gas industry to undertake long-range planning. At the same time, the Forest Service makes no irreversible or irrevocable decisions to lease these lands. Under 36 CFR 228.102(d), the BLM shall be promptly notified as to the Forest-wide leasing decisions that have been made by identifying lands which have been found administratively available for leasing.

Based on the information disclosed in the Final EIS, I have selected Alternative 1(a) for the Rocky Mountain Division and Alternative 7 for the Jefferson Division for the availability decision.

Table ROD-1 is a summary of the acres of Lands Administratively Available for Leasing in accordance with 36 CFR 228.102(d). Leasing decisions for specific lands, including stipulations, are discussed in section B and shown in Table ROD-2.

TABLE ROD-1
Areas Available/Unavailable for Leasing

	ACRES	%
Total Forest Area	**1,862,453**	**100**
Legally Unavailable Areas		
Wilderness	385,901	
Forest Plan Recommended Wilderness areas	55,773	
Big Snowy WSA	87,928	
Middle Fork Judith WSA	81,032	
Permitted Ski Areas	3,824	
Total	**614,458**	**33**
Area Administratively Available for Leasing	**1,247,995**	**67**

Rationale for the Availability decision:

In making the decisions on which lands are *administratively* available for leasing or not *administratively* available for leasing I considered:

- Decisions and direction established in the Lewis and Clark National Forest Land Management Plan.
- The analysis of the environmental, social, and economic effects as displayed in the Final EIS.
- The public comments received during development of this Final EIS.

In making this decision, I recognize oil and gas leasing, exploration, and development are a legitimate, permissible, and viable use of National Forest System lands. This is evidenced by several laws affecting the management of these

public lands including the Organic Administration Act of 1897, Mineral Leasing Act of 1920, Mineral Leasing Act for Acquired Lands of 1947, Mining and Mineral Policy Act of 1970, National Forest Management Act of 1976, and the Energy Security Act of 1980. These laws are described in Appendix L of the Final EIS.

The range of alternatives identified and analyzed provided me with sufficient information to make a reasoned decision regarding availability of lands. Chapter II of the Final EIS, pages II-4 through II-14, describes the alternatives I considered, which included alternatives suggested by the public. After reviewing the analysis presented in the Final EIS, I made my decision based on an evaluation of the alternatives to determine which best meets the project purpose and need, and resource objectives, while also responding to the public issues and concerns expressed throughout the project. *I have determined that retaining these lands as administratively available for leasing provides for flexibility in future leasing decisions. This does not mean or require that all administratively available lands be offered for lease at this time.*

The alternatives analyzed range from not making any lands available for leasing to making all lands available and offering them for lease with limited restrictions, with several alternatives falling in between. Consideration was also given to leasing all lands with Standard Lease Terms, to determine whether additional stipulations were necessary. Applying the Reasonably Foreseeable Development scenario to these alternatives provided me with an acceptable range of effects that addressed the significant environmental issues described in the Final EIS on pages II-1 through 3.

B. LEASING DECISION – 36 CFR 228.102(e) – Leasing for Specific Lands Decisions

The Availability Decision and the Leasing Decision are related to each other in that the leases authorized will be on lands earlier found to be Administratively Available for Leasing, and each lease will include the stipulations determined to be necessary in the specific leasing decision.

I have reviewed the availability decision on which lands are administratively available for leasing and authorize the BLM to offer specific lands for lease subject to:

1. Verifying oil and gas leasing on the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest Plan.

2. Ensuring conditions of surface occupancy identified in Section 228.102(c)(1) are properly included as stipulations in resulting leases.

3. Determining operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

In this decision, the Forest Service does make specific decisions to authorize leases on individual, specified areas of land.

Lands Available but Not Offered for Lease at this Time and Rationale for Decision

Regulations under 36 CFR 228.102(e) allow the Forest Service to authorize the BLM to offer *specific* lands for lease. The regulations do not obligate the Forest Service to offer all administratively available lands for lease. The options to the Forest Service include lease all *available* lands, or NOT lease any of the available lands, or to lease

some specific lands at this time with varying stipulations to protect federal resources.

Based on public comment and the information disclosed in the Final EIS, I am selecting Alternative 1(a) for the leasing decision on the Rocky Mountain Division and Alternative 7 for the leasing decision on the Jefferson Division. My decision is to NOT LEASE the following administratively available lands at this time.:

- **The entire Rocky Mountain Division.** The presence of an identified traditional cultural district in the RM-1 Geographic Unit (also known as the Badger-Two Medicine area), and potential impacts to this area from oil and gas leasing and development, are compelling reasons to not offer this geographic unit for lease. In addition, most of this area is presently under lease. The terms of these leases have been suspended by the Bureau of Land Management pending review of the information regarding traditional cultural uses in the area. The existing leases have between 3 and 7 years remaining on their 10-year terms once the suspension is lifted. Two leaseholders have entered into discussions with the Department of Interior in regards to the possibility of trading out of lease rights in the Badger-Two Medicine. Chevron and FINA have indicated that they would be willing to consider accepting bidding credits on offshore leases in exchange for their lease rights in the Badger-Two Medicine. While discussions involving such possibilities are by no means close to being final, the fact that such action is being considered is also compelling reason not to lease these lands in the near future.

The vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration in the Lewis and Clark National Forest, particularly on the Rocky Mountain Front (the Front), which is within the Rocky Mountain Division. Concerns expressed include potential impacts to wildlife and other surface resources. A majority of the concerns, however, were expressed regarding the "value of place," speaking in particular to social and personal values attributed to the Front. It is clear that this is a very unique and special place to many people; both those who live here in Montana as well as those who have visited or only heard about the area. Many of those who commented during the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express heartfelt emotions about a place they consider special. Many feel that development of any kind, particularly oil and gas development, would "ruin" the special feeling of the Front, regardless of whether they ever saw or experienced the results of development. Their perceptions about the value and spirituality of a place would be affected. Many feel that relatively undeveloped lands such as those on the Front are a diminishing resource, and increasingly hard to find. They point to its uniqueness in that sense. They also feel the need for oil and gas does not outweigh the intrinsic values of the lands in and along the Rocky Mountain Front. Indeed, while the Department of Energy projects an increase in natural gas consumption over the next 15-20 years, combined domestic and imported natural gas supplies are expected to keep pace with this demand.

This analysis, as well as other previous analyses addressing oil and gas issues on the Rocky Mountain Division, show that limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resource values. I also understand that oil and gas technologies have made significant advances in reducing impacts to sensitive areas such as the Rocky Mountain Division, and I expect that these technologies will continue to improve in the future. But, the effects of such activities on social values and human needs and desires are much more difficult to quantify or describe. These difficult concepts have been at the crux of the issue regarding management and uses (particularly oil and gas leasing and development) along the Rocky Mountain Front for many years. The Forest has tried to recognize these social and emotional values and they have figured prominently in my decision not to lease the Rocky Mountain Division. I have considered social values as well as scientific values and recognize the importance of both. There are many disparate viewpoints on the subject of oil and gas leasing and development along the Rocky Mountain Front. It would be an impossible task to please all points of view on this subject.

I recognize the Rocky Mountain Division has high potential for the occurrence of hydrocarbons, even though there are differing opinions on specific estimates of the amount of hydrocarbon resources. Development of these resources could provide economic benefits to local economies as well as the State of Montana and Federal Government. Some have contended that not allowing oil and gas development on National Forest System lands on the

Front will mean that development on adjacent private lands is less attractive and potential revenues from private drilling may be lost. I realize that possible oil and gas revenue has been an important consideration for the State of Montana, as well as some local communities, who are looking for new or additional revenue sources to the economy. It could also be argued that non-monetary or other use values are higher, however, and could result in more revenue from tourism and recreational uses, over time, than alternatives that allow oil and gas development. These, too, are difficult comparisons to make.

The argument has been made that not allowing leasing on the Rocky Mountain Division does not meet Congressional intent for mineral leasing or Forest Service mineral policy. Forest Service mineral policy in relation to minerals management is to encourage, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation. It is also policy to ensure the integration of mineral resources through the land and resource management planning process. The analysis documented in the Final EIS is part of that planning process. While my decision will not offer the Rocky Mountain Division for lease at this time, these lands have not been withdrawn nor made administratively unavailable for leasing. In addition, lands on the Jefferson Division identified as having moderate potential for the occurrence of oil and gas would be offered for lease with stipulations.

From the number and context of most of the comments I have received, I feel not leasing the Rocky Mountain Division at this time will preserve

options for future use of these lands, whether that be for wilderness designation or other multiple uses. By keeping these lands as administratively available, I am not foreclosing future options for reconsidering this leasing decision should the need arise. The temporal scope of this analysis is considered to be 10 to 15 years, similar to most other planning documents. The Forest Service has the opportunity to review this analysis and decision any time conditions change from the present.

- **Inventories lands adjacent to Wilderness Study Act areas.** These are lands that border wilderness study areas in the Big Snowy Mountains and Middle Fork Judith River in the Little Belt Mountains. These lands were analyzed, along with lands identified in the 1977 Montana Wilderness Study Act, as to their suitability for wilderness inclusion. While the Lewis and Clark Forest Plan did not recommend these lands for wilderness, Forest Plan direction is to manage them so as to maintain their wilderness character pending final Congressional action. For this reason, I will not authorize leasing on these adjacent inventoried roadless lands at this time. Because exact boundaries of some of these areas have not been finalized, I have included small acreages of land that may or may not be part of the inventoried roadless area. In addition, I have decided not to lease the road corridor leading to the Crystal Lake recreation area in the Big Snowy Mountains. This road corridor is fairly confined with limited occupancy opportunities and receives high recreational use. I feel oil and gas development in this corridor is not compatible with existing uses.

- **River segments considered to be eligible for "wild river" designation under the Wild and Scenic Rivers Act.** Consistent with present Forest Plan direction, these river segments will not be offered for lease at this time.

I feel that it is not appropriate to consider offering these lands for leasing at this time for the reasons stated. However, if the situation changes in the future, I will reconsider this decision. I will do this through the appropriate NEPA documentation that will include public involvement and an analysis to determine appropriate stipulations to include to provide the needed surface resource protection.

This decision will apply to lands currently under lease *when those leases terminate or expire.*

Lands Available and Authorized for Lease and Rational for Decision

My decision to lease the remaining administratively available lands on the Jefferson Division is based on the information disclosed in the Final EIS. I have selected Alternative 7 as displayed in the Final EIS for the leasing decision for specific lands on the Jefferson Division subject to appropriate stipulations and management directives.

I am authorizing the BLM to lease the lands on the Jefferson Division identified as available and authorized for lease with the stipulations described in Alternative 7 of the Final EIS and displayed in Table ROD-2, page 8 and Map II-16.

The rationale for selecting Alternative 7 for lands on the Jefferson Division is consistent with the analysis in the oil and gas Final EIS.

Many of the public comments expressed concern over the compatibility of potential oil and gas activities with other resource values or uses. My decision ultimately offers 891,884 acres of the Lewis and Clark National Forest (about 48% of the analysis area) for leasing with stipulations. Approximately 356,111 acres (19% of the analysis area) will not be offered for lease at this time. Key resources and sensitive sites are to be leased with No Surface Occupancy (20% of the analysis area), and the remaining offered lands would contain protective stipulations (see Table ROD-3).

The Lewis and Clark National Forest Plan provided a foundation for the decisions being made, and served as the proposed action against which other alternatives were considered. For that reason, an alternative that relied almost exclusively on Standard Lease Terms (SLT) for resource protection was not considered in detail. The analysis disclosed standard terms alone could not fully satisfy the objectives of the Forest Plan direction in some resource areas. Amending the Forest Plan to relax constraints upon oil and gas activity would risk compromising the Plan's efforts to make such activities compatible with other resources and uses. This analysis did, however, analyze the use of Standard Lease Terms to determine if additional protective stipulations for certain resources were in fact necessary.

The alternatives presented in the analysis presented a broad range of stipulations for consideration, as well as a range in the amount of lands that would be available, or offered, for lease (see Final EIS, Chapter II, Description of Alternatives). The alternatives were based on issues identified during scoping and throughout development of the document. Appendix F of the Final EIS discloses the objective and justification for each stipulation applied. In each case where a special stipulation is prescribed, the analysis displayed

application of only SLTs would not adequately protect the resource.

Alternative 7 was modified slightly from the Draft EIS to address the concerns of the many people who took the time to respond to the Draft EIS. Those issues and concerns and our responses to them are captured in Chapter IX of the Final EIS. On the Jefferson Division, the Final EIS changes a small area bordered by inventoried roadless lands on the southern edge of the Big Snowy Mountains from No Surface Occupancy (NSO) to No Lease. In consideration of possible cumulative effects of oil and gas activities combined with other reasonably foreseeable actions in the Little Belt Mountains, a Controlled Surface Use (CSU) stipulation was included in the Selected Alternative to protect elk summer range and old growth stands.

The combination of Alternatives 1(a) and Alternative 7 was also chosen as the Selected Alternative because 75% of inventoried roadless lands on the Forest are fully protected through application of the NSO or No Lease designations. Of the over 1,800,000 acre analysis area, only 3 acres of inventoried roadless lands are potentially directly affected and only 450 acres could be indirectly affected (Final EIS, pages IV-98-101, with modifications for Rocky Mountain Division in which all inventoried roadless lands are protected). By selecting Alternative 1(a) for the Rocky Mountain Division, all Management Situation I grizzly bear habitat would be precluded from leasing. Further, a combination of Alternative 1(a) and 7 protects known populations of sensitive fish by either not leasing or applying a NSO stipulation to drainages known to support westslope cutthroat trout. Habitat used by a multitude of wildlife species on the Rocky Mountain Division would not be offered for lease.

Alternative 7 for the Jefferson Division protects developed recreational sites, trailheads, and special use areas by applying a NSO stipulation to a ¼ mile area surrounding them. Soils prone to mass movement are stipulated by CSU to allow for relocation of facilities, or special engineering design, if necessary. Alternative 7 for the Jefferson Division protects scenery resources through use of a CSU stipulation, providing flexibility in locating activities in these areas. Core populations of sensitive plants on the Jefferson Division are protected by a NSO stipulation. A CSU stipulation applied to all watersheds on the Jefferson Division to ensure that road construction and other activities will maintain water quality and quantity. Research Natural Areas and the Tenderfoot Experimental Forest are stipulated by NSO to maintain undisturbed habitats and ensure that research goals can be met. River segments determined to be eligible for wild status under the Wild and Scenic Rivers Act would not be offered for lease, and candidates for scenic or recreation designation on the Jefferson Division are protected by a CSU stipulation to ensure that location and design of facilities are compatible with scenic and recreational uses. Areas identified as having traditional cultural importance to American Indians are not offered for lease under my decision, in recognition of the special values of these areas.

While protecting the resources, Alternative 7 on the Jefferson Division is also responsive to the purpose and need for conducting this analysis by complying with the many laws, regulations, and policies while allowing for potential oil and gas activities in an environmentally sensitive manner. I have determined that authorizing leasing on these lands with appropriate stipulations will not result in unacceptable impacts to any resource (Final EIS, Chapter IV). Therefore, I am authorizing the BLM to lease all available lands *that are authorized for lease* on the Jefferson Division with stipulations described in Alternative 7. The decision applies

to the federal mineral estate on lands within the Jefferson Division.

NINTH CIRCUIT RULE 36-2

CRITERIA FOR PUBLICATION

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

NINTH CIRCUIT RULE 36-3

CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

(a) Not Precedent: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.

(b) Citation: Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix. *(New Rule 7/1/2000)*